BRF 242

92-496

Supreme Court, U.S.
FILED
SEP 8 1992
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

RENE GARCIA, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

September 8, 1992

QUESTION PRESENTED FOR REVIEW

The Court of Appeals reversibly erred in not sustaining petitioner's point of error no. 3, which read (Pet.App. 43):

> The evidence was insufficient to support a two point enhancement of Rene Garcia's sentence for obstruction of justice.

LIST OF ALL PARTIES BELOW

The original parties before the United States Court of Appeals for the Fifth Circuit: The United States of America and Petitioners Rene Garcia and Jorge Rodrigo Garcia.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioners' undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner Rene Garcia was represented at trial by attorney Jesus M. Alvarez of Rio Grande City, Texas. Attorney George R. Pitchford of McAllen, Texas represented Rene Garcia on appeal. Petitioner Jorge Rodrigo Garcia was represented at trial by attorney G. Alan Ramirez of Roma, Texas. Attorney Jseoph A. Connors III, represented Jorge Garcia on appeal.

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BRF242

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

RENE GARCIA, Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court:

RENE GARCIA petitions for review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On June 10, 1992, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. United States v. Garcia, No. 91-8558. This opinion is unreported (Pet.App. 3).

JURISDICTION

On June 10, 1992, the United States Court of Appeals for the Fifth entered its opinion affirming the judgment of conviction in this case.

Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law; ...

Sentencing Commission Guideline § 3C1.1 provides that:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

STATEMENT OF THE CASE

A. Appeals Court's Jurisdiction

The court of appeals had jurisdiction of petitioner's direct appeal by virtue of 28 U.S.C. 1291.

B. Procedural History in District Court

The petitioner, Rene Garcia and Jorge Rodrigo Garcia were convicted by a jury of (1) conspiracy to possess with intent to distribute more than 50 kilograms of marijuana, in violation of 21 U.S.C. 846 and 841(a)(1) and (b)(1)(B); and (2) possession with intent to distribute more than 50 kilograms of marijuana, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B). The district court sentenced each defendant to concurrent terms of imprisonment of 72 months on each count, a $100 special assessment, and equal concurrent terms of supervised release -- five years for petitioner and six years for Jorge. Both defendants appealed. The Court of Appeals

for the Fifth Circuit affirmed the convictions.

C. Statement of the Facts:

On November 25, 1990, Louis Rocha, U.S. Border Patrol Agent, noticed a man, later identified as Jorge, near a white pickup on the side of the road about 20 miles from Carrizo Springs, Texas, on Farm to Market Road 2644. Rocha testified that he had offered assistance, but that the man identified as Jorge, had just answered that his truck had run out of gas, and that although his father and brother were in Eagle Pass, he preferred to walk rather than to have them called for assistance.

The individual identified as Jorge, left on foot. Agent Rocha returned to the truck and discovered that it was registered to a Francisco Barrera of the Guajalota Ranch in the La Grulla near Rio Grande City, Texas. As Rocha pulled his car next to the cab of the truck, he noticed that the window

was rolled down, the door was unlocked, binoculars and a pouch were on the seat, and a CB radio was partially under the seat. Rocha pulled off the road to allow three vehicles to pass, a red truck, a gray Suburban, and a car. Once behind the white truck, Rocha detected a strong odor of marijuana. The cover of a tool box in the truck was tied with twine and partially opened. Rocha testified that he saw exposed plastic wrappings; and when he opened the cover, he discovered 220 pounds of marijuana.

Rocha drove out in the direction the individual he identified as Jorge had walked, but Jorge was gone. Rocha went back to the white truck and radioed Agent Robert Gonzalez who was at the next intersection. A full description was given of the individual and the three vehicles who passed him on the road. Rocha later received a radio message that police officers had found

the described individual and would hold him at the Border Patrol until Rocha arrived to identify him.

Sheriff's Deputy Ramon Saenz had heard a radio report that two individuals had been seen in a red pickup at a convenience in Carrizo Springs. Deputy Saenz stopped the red truck and asked to see identification. The red truck was registered to Rene Garcia's father-in-law, Conraldo Villarreal. Rene told Saenz that Jorge had been with him since the brothers left their mother's home in Rio Grande City that morning.

Agent Gonzalez joined Deputy Saenz and questioned Jorge and Rene. Apparently both men told Gonzalez that they were looking for a mechanic to fix Jorge's vehicle, but that they were also in the area to do some hunting. There was a deer rifle, a CB radio, and a bag of deer corn in the truck. There was also a deer license issued to Rene.

Rene Garcia testified that he and his brother Rodrigo were going to visit their father in Eagle Pass and possibly go hunting at his friend's uncle's ranch. Rene borrowed his father-in-law's pickup for this purpose. They left from their mother's home on November 25th. When Rene and Jorge got to Carrizo Springs, they went looking for a place to try to purchase some gifts for his father's two daughters. They were on their way to Wal-Mart when they were stopped by a police car. Rene and Jorge answered the deputy's questions and the Border Patrol Agents who arrived later. Rene and Jorge followed the agents to the Border Patrol Station. Both were again interrogated by other agents, and again, Rene told him that he and his brother were on their way to Eagle Pass to see their father, and maybe do some hunting. The only time he and Jorge separated on the trip was when Rene went to the bathroom at the little convenience store

in Laredo when they stopped to gas up. It was not true that Jorge was driving that white truck and Rene was somehow involved. On November 25, 1990, Rene and Jorge did not conspire to possess marijuana with intent to distribute it. They were never in possession of that marijuana. On November 25, 1990, Rene did not even see his brother Jorge in possession of that marijuana.

Rene Garcia's sentence was enhanced two (2) points after the United States Probation Officer recommended to the trial judge that since the jury found Rene guilty on both counts of the indictment, his trial testimony should be considered "perjury".

SUMMARY OF ARGUMENT ON REASONS FOR REVIEW

Under Supreme Court Rule 10.1(a), the Supreme Court should exercise its judicial discretion and allow the writ in this case because the Fifth Circuit Court of Appeals has rendered a decision consistent with United States v. Pattan, 931 F.2d 1035, 1043

(5th Cir. 1991), but in conflict on the same matter with the decision in United States v. Dunnigan, 944 F.2d 178 (4th Cir. 1991), cert. filed, 60 U.S.L.W. 3600 (1992).

ARGUMENT ON QUESTION

This issue's resolution turns on whether the Fifth Circuit's review of the application of Sentencing Guidelines § 3C1.1 adequately safeguards an accused's Fifth Amendment right to testify. The Fifth Circuit, as other circuits, hold that the findings of fact of the district court are reviewed under the "clearly erroneous" standard. United States v. Mourning, 914 F.2d 699, 704 (5th Cir. 1990). However, as pointed out by the Fourth Circuit in Dunnigan, a guilty verdict will never be "clearly erroneous."

> We are not satisfied that there are enough safeguards in place to prevent this enhancement from unfairly coercing defendants, guilty or innocent, into remaining silent at trial. Other circuits have reviewed the district court's

> finding of untruthfulness under a "clearly erroneous" standard. Batista-Polaneo, 927 F.2d at 22; Matos, 907 F.2d at 276; Wallace, 904 F.2d at 605; Beaulieu, 900 F.2d at 1540; O'Meare, 895 F.2d at 1220. Of course, in light of the jury's verdict of guilt, the district court's finding will never be clearly erroneous" where the verdict is sustainable; if the verdict cannot be supported, the sentencing finding will of course be moot. Our review of these enhancements would therefore be an empty ritual. Dunnigan at 185.

The Fourth Circuit was correct in asserting that the two level enhancement as applied in Dunnigan went against the longstanding precedent in United States v. Grayson, 438 U.S. 41 (1978). Under the "old" sentencing law, a court could consider the defendants "perjury" at the time of trial, even though the defendant was neither charged with, nor convicted of perjury. The Supreme Court was also careful to state that:

> Nothing we say today requires a sentencing judge to enhance, "in some wooden or reflex fashion," the sentences of all defendants

> whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determine - with a consciousness of the frailty of human judgment - whether that testimony contained willful and material falsehoods, and, if so, assess in light of all the other knowledge gained about the defendant the meaning of that conduct with respect to his prospects for rehabilitation and restoration to a useful place in society.

The Fourth Circuit was correct in its reasoning that this automatic enhancement resulted in punishment for the additional crime of obstruction of justice without an indictment or trial. Dunnigan at 183-184.

Up to now, only the Fourth Circuit has decided that § 3C1.1 has an unconstitutional chilling effect on the Fifth Amendment right of a defendant to testify. There are other circuits which have held that an obstruction of justice enhancement erased solely upon a verdict of guilt is not permissible. In United States v. Martinez, 922 F.2d 914 (1st

Cir. 1991), the court held that an obstruction of justice enhancement based upon a jury verdict alone was punishment for exercising right to testify in his own defense. In United States v. Husky, 924 F.2d 223 (11th Cir. 1991), the court held that an independent finding of willful perjury was necessary rather than relying solely pon jury verdict. In United States v. Willis, the court 940 F.2d 1136 (8th Cir. 1991) held that the obstruction of justice enhancement cannot be given solely because jury disbelieves defendant, the district court has to make an independent finding. In United States v. Corn, 956 F.2d 135 (7th Cir. 1992), the court held that the lower court should not have automatically enhanced the sentence of a defendant who takes the stand and is convicted. In United States v. Lozoya-Morales, 931 F.2d 1216 (7th Cir. 1991), the Court held that imposing the enhancement penalty automatically from a

jury verdict impinges on the right to testify in defendant's behalf. In United States v. Davis, 938 F.2d 744 (7th Cir. 1991), the court affirmed the enhancement by finding that the district court had made an independent finding of perjury and did not rely solely upon the jury verdict in affirming the enhancement. In United States v. Ogbeifun, 949 F.2d 1013 (8th Cir. 1991), the court upheld the application of the two level enhancement because because the district court head made an independent determination of false testimony rather than defendant's inability to covince the jury of his innocence.

As § 3C1.1 guideline was applied in this case, there can be no doubt that this two level enhancement goes against Grayson's prohibition against "wooden or reflexive" reliance upon a guilty verdict and its inconsistent with the First, Seventh, Eighth, and Eleventh Circuits application of

§ 3C1.1 in United States v. Martinez, 944 F.2d 914 (1st Cir. 1991); United States v. Lozoya-Morales, 931 F.2d 1216, 1218-1220 (7th Cir. 1991); United States v. Davis, 938 F.2d 744, 747 (7th Cir. 1991); United States v. Corn, 956 F.2d 135, 136 (7th Cir. 1992); United States v. Willis, 940 F.2d 1136, 1140 (8th Cir. 1991); United States v. Seabolt, 958 F.2d 231, 233 (8th Cir. 1992); United States v. Ogbeifun, 949 F.2d 1013, 1014 (8th Cir. 1991) and United States v. Husky, 924 F.2d 223, 225 (11th Cir. 1991).

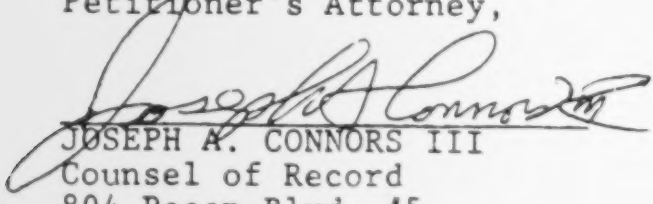
The district court made no independent findings of fact. It was obvious that it had placed great weight on the jury verdict in determing that Rene Garcia had testified falsely at trial and that the two level enhancement was necessary.

CONCLUSION

For the foregoing compelling reason, this Court should grant this petition for writ of certiorari.

DATED: September 8, 1992.

Respectfully submitted by
Petitioner's Attorney,



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APPENDIX TO PETITION

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September 8, 1992

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8558
(Summary Calendar)

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V.

JORGE RODRIGO GARCIA AND RENE GARCIA,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(DR-90-CR-103 (1,2))

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIAM:*

Brothers Jorge Rodrigo Garcia (Jorge) and Rene Garcia (Rene) appeal to their jury convictions and sentences for conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846. They complain, inter

alia, that the evidence was insufficient to support their convictions, that the district court committed errors in sentencing, and that closing remarks by counsel for the government constituted prosecutorial misconduct. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

A jury convicted Jorge and Rene of conspiracy to possess with intent to distribute more than 50 kilograms of marijuana (count one) and possession with intent to distribute more than 50 kilograms of marijuana (count two). The district court sentenced each defendant to concurrent terms of imprisonment of 72 months on each count, a $100 special assessment, and equal concurrent terms of supervised release--five years for Rene and six years for Jorge.

The evidence reflects the following events: On November 25, 1990, Louis Rocha,

a U.S. Border Patrol agent, was working on Farm-To-Market Road 2644 west of Carrizo Springs, Texas. Rocha noticed a man, later identified as Jorge, near a white pickup on the side of the road about 20 miles from Carrizo Springs. Rocha asked if there was a problem, and Jorge answered that the truck had run out of gas. The agent offered to place a call for assistance through the radio dispatcher or to give Jorge a ride. Jorge said that although his father and brother were in Eagle Pass he preferred to walk rather than have them called for assistance.

After Jorge left on foot, Rocha returned to the truck and determined that it was registered to Francisco Barrera of the Guajalota Ranch in LaGrulla near Rio Grande City, Texas. He pulled his car next to the cab of the truck and saw that the window was rolled down, the door was unlocked, binoculars and a pouch were on the seat, and

a CB radio was partially under the seat. Rocha had to move his car to the side of the road to allow three vehicles to pass--a red truck, a gray Suburban, and a car. As he pulled off the road behind the white truck, Rocha detected a strong odor of marijuana. Because the cover of a tool box in the white truck was tied with twine and partially opened, Rocha was able to see exposed plastic wrappings. He opened the cover and discovered approximately 220 pounds of marijuana with an estimated value in excess of $250,000.

Rocha then drove in the direction that Jorge had walked, but Jorge was gone. Rocha returned to the white truck and radioed Agent Robert Gonzalez, who was located at the next intersection. Rocha gave Gonzalez a full description of Jorge and the three vehicles that had passed him on the road. Rocha described Jorge as a man "with a white cap with salt and pepper long hair in a pony

tail with a blue shirt and blue jeans and white tennis shoes." About fifteen minutes later, Rocha received a radio message that police officers had found Jorge and would hold him at the Border Patrol station until Rocha arrived to identify him.

Sheriff's Deputy Ramon Saenz had heard a radio report that Jorge and Rene had been seen in a red pick up at a convenience store in Carrizo Springs. Deputy Saenz stopped the red truck and asked to see the men's identification. The red truck was registered to Rene's father-in-law, Conraldo Villarreal. Rene told Saenz (and later testified at trial) that Jorge had been with him since the brothers left their mother's home in Rio Grande City that morning.

Shortly thereafter, Agent Gonzalez jointed Deputy Saenz and questioned Jorge and Rene. According to Gonzalez, the men stated that they were looking for a mechanic

to fix Jorge's vehicle. They also stated that they were in the area to do some hunting. Gonzalez noticed a deer rifle, a CB radio, and a bag of deer corn in the truck. Rene had a valid deer hunting license. [Later, Rene stated that he was taking the gun to his father in Eagle Pass because his father was going hunting. Their father testified that he had his own gun but he was no longer a hunter. At trial, Rene stated that the gun was for his own use. He explained that there was only one gun because Jorge did not hunt.]

Jorge and Rene agreed to go to the Border Patrol station, and Agent Gonzalez and Deputy Saenz escorted them. When Agent Rocha arrived, he positively identified Jorge as the man he had seen earlier near the white truck on Road 2644.

II

ANALYSIS

A. Sufficiency of the Evidence

Jorge and Rene both argue that the evidence was sufficient to sustain their convictions.

> The standard for evaluating the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). In viewing the evidence in the light most favorable to the verdict, we afford the government the benefit of all reasonable inferences and credibility choices. United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988).

United States v. Daniel, ____ F.2d ____ (5th Cir., March 19, 1992, No. 91-1739, slip op. 3557, 3559).

The brothers moved for judgment of acquittal at the close of the government's case but failed to renew their motions at the close of all of the evidence. "In this circumstance, appellate review is limited to

determining whether there was a manifest miscarriage of justice, that is, whether the record is devoid of evidence pointing to guilty.'" Daniel at 3559 (citing United States v. Robles-Pantoja, 887 F.2d 1250, 1254 (5th Cir. 1989) (relying on United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988).[1]

1. Establishing Conspiracy

To support a conviction for conspiracy under § 846, the government must show

> (1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that each alleged conspirator knew of the conspiracy and intended to join it, and (3) that each alleged conspirator did participate in the conspiracy. All elements may be inferred from circumstantial evidence. In drug conspiracy cases the government need not prove an overt act in furtherance of the conspiracy.

United States v. Carter, 953 F.2d 1449, 1453 (5th Cir. 1992) (citations omitted). "All ... elements must be found to uphold a conspiracy conviction." United States v.

Espinoza-Saenz, 862 F.2d 526, 536-37 (5th Cir. 1988).

On appeal, Jorge's argument rests on whether the government carried its burden of proving each element of conspiracy against Rene. He contends that, because the government failed to prove the elements of the offense as to Rene, it failed to prove the first element of conspiracy, i.e., an agreement between two or more persons, as to Jorge.

The government's conspiracy case against Jorge and Rene rests primarily on Agent Rocha's testimony. Rocha found Jorge stranded on a lightly traveled road with a disabled white truck. The agent verified that the white truck was under Jorge's control. Jorge declined an offer of assistance from Rocha and began walking down the road, ostensibly to get help. After discovering the marijuana, Rocha determined that Jorge was no longer on the road. Rocha

radioed Jorge's description, with distinct details regarding hair and clothing, and a description of three vehicles, including a red truck, in one of which Jorge was likely given a ride. Within minutes, other officers spotted a red truck matching Rocha's description of one of the vehicles. It was driven by Rene who was accompanied by a passenger fitting the radioed description of the man who had abandoned the white truck. At the Border Patrol station, Rocha positively identified Jorge as the man with whom Rocha had talked by the disabled white truck on Road 2644.

In reviewing the sufficiency of the evidence, this court "affords the government the benefit of all reasonable inferences and credibility choices." Daniel at 3559 (citation omitted). From the evidence, a reasonable jury could infer that Jorge and Rene agreed to travel together, albeit in separate vehicles, to deliver the marijuana

which Rocha found in the white truck that was under Jorge's control. From the quantity and odor of marijuana, the jury could also infer that both men knew of the presence of marijuana in the truck. Therefore, the evidence is sufficient for the jury to have concluded that the brothers acted together and were guilty of conspiracy.

Rene raises several challenges to the government's case. He contends that 1) his family relationship to Jorge is insufficient to prove conspiracy; 2) the government's theory that Rene was driving a "scout vehicle" fails because the red pickup was traveling behind the white truck, ad a "scout vehicle" normally travels ahead of the vehicle carrying the contraband; and 3) although officers found CB radios in both vehicles, there was no showing that the radios were working or that they were tuned to the same frequency.

Clearly, family relationship alone is not enough to show a conspiracy, but "when inferences drawn form the existence of family relationship or 'mere knowing presence' are combined with other circumstantial evidence, there may be sufficient evidence to support a conspiracy conviction." United States v. Williams-Hendricks, 805 F.2d 496, 503 (5th Cir. 1986). In this case, the brothers' convictions are not based solely on their filial relationship. The remaining arguments regarding the role of the red truck and the significance of the CB radio are factual and, thereby, in opposite. Proof of the elements of the offense of conspiracy was based on other evidence. These facts do not dispute the evidence and inferences upon which the convictions were based.

The brothers also attempt to place importance on the fact that Rocha could not have seen Jorge on the road at 12:53 p.m.

because the sheriff's log indicates that Saenz stopped the red truck at 12:58 p.m. This argument is unconvincing. Rene and Jorge acknowledge that Rocha "approximated" the time at which he saw Jorge. The discrepancy is not so great as to be significant. Moreover, these determinations are within the sole province of the jury. See United States v. Molinar-Apodaca, 889 F.2d 1417, 1423 (5th Cir. 1989).

Viewing the evidence as a whole under the applicable standard of review, there is no showing of manifest miscarriages of justice in allowing the jury's convictions of Jorge and Rene on charges of conspiracy to possess the marijuana to stand.

2. Possession

In order to establish the substantive count of possession with intent to distribute, the government has the burden of proving that the defendants 1) knowingly, 2) possessed marijuana, 3) with the intent to

distribute it. United States v. Diaz-Carreon, 915 F.2d 951, 953 (5th Cir. 1990). "[P]ossession [of contraband] may be actual or constructive, joint among several people and proved by circumstantial evidence." United States v. Moreno-Hinojosa, 804 F.2d 845, 847 (5th Cir. 1986).

To establish constructive possession by Jorge, the government must show that he controlled, or had power to control, the marijuana or the automobile in which it was contained. Id. Agent Rocha testified that he first spotted Jorge near the white truck. When Agent Rocha questioned Jorge and offered him help, Jorge stated that he had run out of gas. The evidence is sufficient to establish control of the vehicle and, therefore, constructive possession of the marijuana. Moreover, it was reasonable for the jury to infer that Jorge knew that the truck contained marijuana. The quantity of

marijuana was in excess of 220 pounds, and Agent Rocha testified that the odor of marijuana was detectable. It is undisputed that the quantity was sufficient to infer intent to distribute. See United States v. Willliams-Hendricks, 805 F.2d 496, 501-02 (5th Cir. 1986).

As discussed above, the evidence linking Rene to Jorge is sufficient. Therefore, Rene is deemed to have possessed the marijuana through Jorge's possession because Rene is Jorge's co-conspirator. See United States v. Gallo, 927 F.2d 815, 822 (5th Cir. 1991). The evidence was sufficient for the jury to conclude that the brothers were guilty of possession.

As with the conspiracy count, the brothers attempt to show that the evidence of possession was not sufficient by pointing out what the government failed to show. Jorge and Rene contend that 1) there was no direct evidence that either brother drove

the white pickup or had dominion and control over it, 2) Rene was never seen near the white truck, 3) the keys to the white truck were never found, 4) neither man knew that the truck contained marijuana, and 5) fingerprints of either were never recovered from the white truck. Because the evidence was sufficient to prove the elements of the offense, the absence of proof of additional facts is of no effect. There was no manifest miscarriage of justice in finding that the brothers committed the offense of conspiracy.

B. Sentencing

Application of the Sentencing Guidelines is a question of law subject to de novo review. United States v. Otero, 868 F.2d 1412, 1414 (5th Cir. 1989). The findings of fact of the district court are reviewed under the "clearly erroneous" standard. United States v. Mourning, 914 F.2d 699, 704 (5th Cir. 1990).

1. Obstruction of Justice - Rene

Rene argues that the district court erred in increasing his offense level by two for obstruction of justice under U.S.C.G. § 3C1.1. He contends that his testimony "did not amount to the willful actual or attempted obstruction or impediment of justice contemplated for the two point enhancement." He asserts that his testimony was "merely less credible than the one the jury liked."

Guideline § 3C1.1 provides that:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

In the presentence report (PSR), the probation officer recommended the enhancement for obstruction of justice. The probation officer stated that Rene's testimony at trial constituted materially

false information. "'Material' ... information ... means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1, comment. (n.5).

Agent Rocha positively identified Jorge as the man he saw walking away from the disabled white truck. Moreover, Rocha was able to radio a description of Jorge and three vehicles that could have picked him up on the road. Within minutes, Deputy Saenz stopped two men in one of those vehicles, the red truck. That truck and one of the men in it fit the descriptions given by Rocha. Contradicting the testimony of law enforcement officers, Rene testified under oath that he had not picked up Jorge on the road and that they had been together since they left home that morning.

Defense counsel objected to the characterization of Rene's testimony as

perjurious. He argued that Rene merely exercised his constitutional "right to testify as to the facts as the Defendant sees them." The district court implicitly adopted the findings of the PSR and sentenced Rene within the guidelines.

On appeal, Rene asks this court to adopt the holding in United States v. Dunnigan, 944 F.2d 178 (4th Cir. 1991), cert. filed, 60 U.S.L.W. 3600 (1992). In Dunnigan, the court disallowed an enhancement for obstruction of justice "for a disbelieved denial of guilty under oath." 944 F.2d at 185. This holding was explicitly rejected un United States v. Ogbeifun, 949 F.2d 1013, 1014 (8th Cir. 1991).

We have upheld the increase of offense level for obstruction of justice when the defendant has testified untruthfully. See United States v. Pattan, 931 F.2d 1035, 1043 (5th Cir. 1991). Under the law of this

circuit, the district court did not err in applying the obstruction guidelines to Rene.

2. Downward Departure - Jorge

Jorge contends that the district court erred in declining to depart downward based on his military record. Jorge implicitly asserts that the district court misapplied the guidelines when he contends that the district court was unaware that it had the discretion to depart downward on the basis of his military record.

A court may depart from the guidelines if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s. 18 U.S.C. § 3742 insulates from appellate review sentences that fall within or below the applicable sentencing guideline range, unless the sentence was imposed in violation

of law. See United States v. Lara-Velasquez, 919 F.2d 946, 954 n. 9 (5th Cir. 1990). We have held that "[a] claim that the district court refused to depart from the guidelines and imposed a lawful sentence provides no ground for relief." United States v. Buenrostro, 868 F.2d 135, 139 (5th Cir.), cert. denied, 494 U.S. 923 (1990). However, in United States v. Damer, 910 F.2d 1239, 1241 (5th Cir.), cert. denied, 111 S.Ct. 535 (1990), we applied an abuse-of-discretion standard to review a district court's refusal to grant a downward departure for substantial assistance under § 5K1.1 when the government had filed a motion for such a departure. This court applied yet a third standard of review in United States v. Paden, 908 F.2d 1229, 1234 (5th Cir. 1990), cert. denied, 111 S.Ct. 710 (1991), in which we stated that the district court's determination whether a criminal defendant has provided substantial

assistance to the government is a factual question subject to the "clearly erroneous" standard of review.

In a recent case, the Supreme Court stated that the Sentencing Reform Act "did not alter a court of appeals' traditional deference to a district court's exercise of sentencing discretion," and that "[t]he selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court." Williams v. United States, ____ U.S. ____, 112 S.Ct. 1112, 1121 (1992). Under any of the foregoing standards Jorge's sentence should be and is affirmed.

At the sentencing hearing, Jorge recounted the history of his service in Vietnam and the honors he received. In arguing for downward departure, counsel relied on United States v. Pipich, 688

F.Supp. 191, 193 (D. Md. 1988) for the proposition that "a person's military record is a relevant sentencing factor that was not considered by the Sentencing Commission." In Pipich, the district court sentenced the defendant to probation without intermittent confinement because of the "defendant's exceptional military record." Id. Here, the government argues that a military record was "not a point to be taken into account into [sic] sentencing," relying on United States v. Chiarelli, 898 F.2d 373 (3rd Cir. 1990). In Chiarelli, the defendant argued that "the district court's refusal to consider him military history as a basis for departure denie[d] him due process of law." Id. at 383. The Third Circuit rejected that argument, renewing a previous finding that there was no "substantive due process right to individualized treatment in sentencing." Id.

In the instant case the district court stated that there was "no reason to depart from the sentence that's called for by the application of the guidelines. The court [was] satisfied that the facts of these cases [were] of the type that were contemplated by the sentencing commission when they set up the guidelines."

We find that the seeming disparity in the case law is of little import. Under the first standard of review, we would decline jurisdiction.[3] The district court did not impose Jorge's sentence in violation of the law when it refused to depart from the guidelines. Under the second standard, we would find no abuse of discretion by the sentencing court. Contrary to Jorge's contentions, the district court considered the option of departure from the guidelines and found no reason to depart upward or downward. And we would reach the same result when we apply the "clearly erroneous"

standard. Under any standard of review, the district court did not err in imposing sentence.

C. Prosecutorial Misconduct

Rene and Jorge assert that improper closing argument by the prosecutor amounts to reversible error. Specifically, they challenge the following statement: "We wouldn't be here if I didn't truly believe that I could prove that these defendants were guilty."

Claims of prosecutorial misconduct are reviewed under the following standard:

> [T]he reviewing court must weigh the degree to which the alleged improper argument may have affected the substantial rights of the defendants. Pertinent factors include: (1) the magnitude of the prejudicial effect of the statements, (2) the efficacy of any cautionary instructions, and (3) the strength of the evidence of defendant's guilty.

United States v. McPhee, 731 F.2d 1150, 1152 (5th Cir. 1984) (citations omitted).

An examination of the record reflects that this specific comment by the prosecutor was the last in a series of verbal exchanges among both defense counsel and the prosecutor. Although the defendants objected to the specific statement at issue in this appeal. Therefore, reversal is required only if the prosecutor's remarks rise to the level of plain error. See Diaz-Carreon, 915 F.2d 957-58.

The government concedes that the prosecutor's statement was improper argument but urges here that the comment did not amount to plain error. We agree. A careful reading of the transcript shows that all of the attorneys behaved unprofessionally, but that does not mean that such behavior produced reversible error. The prosecutor interpreted defense counsels' arguments as a personal attack on her and revealed her frustration to the jury. Immediately before the prosecutor made the statement at issue

on appeal, the district court reminded the jury that the two men were presumed innocent. The prosecutor's remark can be interpreted as an attempt to raise the discourse from a personal to a more professional level rather than a commentary of Jorge's and Rene's innocence or guilt. Neither Jorge nor Rene has suffered a miscarriage of justice; there is no reversible error.

In their original brief, Jorge and Rene raised the issue whether there was a discrepancy between the trial court's oral pronouncement of sentence and the written judgment. This issue was withdrawn in their reply brief, so we do not consider it here. For the foregoing reasons, the convictions and sentences of appellants are AFFIRMED.

FOOTNOTES

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The Court in Jackson v. Virginia stated that the "no evidence" rule "fail[ed] to supply a workable or even a predictable standard for determining whether" due process had been met. 443 U.S. at 320.

[2] Jorge and Rene were sentenced on September 16, 1991. At that time, the guidelines did not include a policy statement on military service. Effective

November 1, 1991, U.S.S.G. § 5H1.11, p.s., provides that military service inter alia is "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."

[3] At least one court has refused to review the district court's decision not to depart from the guidelines because military service was not the kind of circumstance intended by U.S.C. § 3553(b) and U.S.S.G. § 5K2.0, p.s. See United States v. Marino, 936 F.2d 23, 32 (1st Cir. 1991).

UNITED STATES DISTRICT COURT
Western District of Texas
Del Rio Division

UNITED STATES OF AMERICA

V.

RENE GARCIA

JUDGMENT IN A CRIMINAL CASE
(For Offense Committed On or After November 1, 1987)

Case Number: DR-90-CR-103 (2)

J. M. ALVAREZ
Defendant's Attorney

THE DEFENDANT:

___ pleaded guilty to count(s) _____

X was found guilty on count(s) One and Two of the Indictment on July 10, 1991 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 841(a)(1) and 846	Conspiracy to possess with intent to distribute more than 50 kilograms of marijuana.	11/25/90	One
21 USC	Possession		

841(a)(1)	with intent to distribute more than 50 kilograms of marijuana.	11/25/90	Two

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

___ Count(s) _____ (is)(are) dismissed on the motion of the United States.

_X_ It is ordered that the defendant shall pay a special assessment of $100.00, for count(s) One and Two, which shall be due _X_ immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 461-27-5143

Defendant's Date of Birth: January 6, 1992

Defendant's Mailing Address:

Rout 3, Box 222, Ramirez St.
Rio Grande City, Texas 78582

Defendant's Residence Address:

Same as mailing address

September 16, 1992
Date of Imposition of Sentence

/s/ Edward C. Prado
Signature of Judicial Officer

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

September 20, 1991
Date

Defendant: RENE GARCIA
Case Number: DR-90-CR-103(2)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of seventy-two (72) months on each of Counts One and Two, to run concurrently.

X The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends commitment to the Federal Correctional Institution at Three Rivers, Texas.

X The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district.

___ at _____ a.m. / p.m. on _____.

___ as notified by the United States marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on _____.

___ as notified by the United States marshal.

___ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____, with a certified copy of this judgment.

_____
United States Marshal

BY _____
Deputy Marshal

Defendant: RENE GARCIA
Case Number: DR-90-CR-103(2)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years on each of Counts One and Two, to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

X The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not possess a firearm or destructive device, and shall be prohibited from transporting or receiving any type of firearm or other dangerous weapon.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such

substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or persons history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: RENE GARCIA
Case Number: DR-90-CR-103(2)

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

___ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 26

Criminal History Category: I

Imprisonment Range: 63 to 78 months

Supervised Release Range: 3 to 5 years

Fine Range: $12,500 to $1,000,000

X Fine is waived or is below the guideline, because of the defendant's inability to pay.

Restitution: $ -0-

___ Full restitution is not ordered for the following reason(s):

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason

to depart from the sentence called for by application of the guidelines.

OR

_X_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

___ upon motion of the government, as a result of defendant's substantial assistance.

___ for the following reason(s):

NO. 91-8558

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPEAL OF CRIMINAL NO. DR-90-CR-103 (1) & (2)	FROM UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS McALLEN DIVISION

THE UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

VS.

JORGE RODRIGO GARCIA (1) AND
RENE GARCIA (2) DEFENDANTS-APPELLANTS

[Note: In that brief, the appellant's six points of error read as follows: see next page]

POINT OF ERROR NO. 1

As to each appellant, the evidence is insufficient to sustain the Count 1 conviction of the alleged conspiracy to possess, with intent to distribute, more than 50 kilograms of marijuana.

POINT OF ERROR NO. 2

As to each appellant, the evidence is insufficient to sustain the Count 2 conviction for possession with intent to distribute more than 50 kilograms of marijuana.

POINT OF ERROR NO. 3

The evidence was insufficient to support a two point enhancement of Rene Garcia's sentence for obstruction of justice.

POINT OF ERROR NO. 4

The district court erred in signing the written judgment sentencing Rene Garcia to incarceration for 72 months when the court orally pronounced that sentence at 60 months during.

POINT OF ERROR NO. 5

The district court erred in accepting the presentence as prepared (7R. 9-11) and in following the Government's Chiarelli position that the court could not (or had no jurisdiction) to depart downward (7R. 18-19) as Jorge Garcia requested under 18 U.S.C. 3553(b) and Pippich, in light of Jorge's military record (7R. 12-15).

POINT OF ERROR NO. 6

The prosecutor reversibly erred in closing jury argument in saying (6R. 113, lines 15-17): "WE WOULDN'T BE HERE IF I DIDN'T TRULY BELIEVE THAT I COULD PROVE THAT THESE DEFENDANTS WERE GUILTY.".

(3)

No. 92-496

FILED
NOV 6 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

RENE GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court properly enhanced petitioner's base offense level under Sentencing Guidelines § 3C1.1 on the ground that he committed perjury at trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-496

RENE GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals, Pet. App. 3-31, is unreported, but the judgment is noted at 966 F.2d 676 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1992. The petition for a writ of certiorari was filed on September 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted on one count of conspiring to possess more than 50 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 846, and on one count of possessing more than 50 kilograms of marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 72 months' imprisonment on each count, to be followed by concurrent terms of five years' supervised release. The court of appeals affirmed.[1]

1. On November 25, 1990, Louis Rocha, a United States Border Patrol Agent, was patrolling a road between Carrizo Springs and Eagle Pass, Texas. He noticed a white pickup truck stopped on the side of the road about 20 miles from Carrizo Springs. He saw a person, later identified as Jorge Garcia, walk away from the truck, heading in the direction of Carrizo Springs. Agent Rocha approached Garcia and asked if anything was wrong. Garcia replied that the truck had run out of gas. Rocha offered to drive Garcia to Carrizo Springs or to radio for assistance. Garcia declined, explaining that his brother and father were in Eagle Pass, but that he preferred not to contact his father for fear he would get angry. Garcia continued on foot in the direction of Carrizo Springs. Pet. App. 4-5; Gov't C.A. Br. 4-5.

Agent Rocha then returned to the truck. He pulled his car up next to the cab of the truck and saw that the window was rolled down and the door was unlocked. He saw

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[1] Petitioner's brother, Jorge Garcia, was tried with petitioner on the same charges, and he also was convicted on both counts.

binoculars and a zippered pouch on the seat, and a CB radio partially under the seat. Agent Rocha had to move his car to allow three other vehicles to pass. As soon as he pulled off the road behind the white pickup, he smelled a strong odor of marijuana. The cover of a tool box in the back of the truck was partially opened, and Agent Rocha could see plastic wrappings. He opened the cover and found approximately 220 pounds of marijuana. Pet. App. 5-6; Gov't C.A. Br. 5-6.

Agent Rocha drove back in the direction Jorge Garcia had been walking, but Garcia was now gone from view. Agent Rocha returned to the white truck and radioed to another agent, Robert Gonzalez, to look for the three vehicles that had passed him. Agent Rocha said Garcia was wearing a white cap, a blue shirt, and blue jeans, and had long salt-and-pepper hair pulled back in a pony tail. Pet. App. 6-7; Gov't C.A. Br. 7-8.

Sheriff's Deputy Ramon Saenz stopped one of the three vehicles described by Agent Rocha, a red truck, and asked to see the identification of the two men inside. Petitioner Rene Garcia was driving the truck, and Jorge Garcia was a passenger. Recognizing the passenger as fitting the description given by Agent Rocha, Saenz asked Jorge Garcia if he had just been picked up as a hitchhiker. Jorge Garcia said he had not. Petitioner and Jorge Garcia later told a Border Patrol officer that they were brothers and were driving to Crystal City, Texas, to find a mechanic, because their vehicle had broken down in Eagle Pass. Pet. App. 7-8; Gov't C.A. Br. 8-9. The brothers said that they were in the area to do some hunting. They could not say where they were going hunting, however, and they were not dressed for hunting. Pet. App. 8; Gov't C.A. Br. 9-10. Agent Rocha later arrived and identified Jorge Garcia as the man he had seen

with the white pickup truck. Pet. App. 8; Gov't C.A. Br. 10-11.

2. At trial, petitioner testified in his own defense. He stated that on the morning in question, he had made plans to go hunting in the Eagle Pass area. Petitioner said that his brother Jorge Garcia was going with him, although Jorge did not hunt. Petitioner said that he and his brother had decided to stop in Carrizo Springs to do some Christmas shopping. While they were looking for a particular store, a police officer stopped their truck and asked them questions. Petitioner denied ever telling the officers that they were going to Crystal City; he said the officers never asked him if he was going hunting; he said he had been with his brother continuously since that morning; and he said that Jorge was never near the white pickup truck. Gov't C.A. Br. 13-16.

3. The presentence report concluded that petitioner had testified falsely at trial and that his testimony therefore called for a two-level enhancement in his base offense level under Sentencing Guidelines § 3C1.1.[2] At the sentencing hearing, petitioner objected to the Section 3C1.1 enhancement. The district court rejected petitioner's objection, however, and increased his offense level by two points for obstruction of justice under Section 3C1.1. Sent. Tr. 7-8, 10, 16, 19-22; Pet. App. 19-20.

4. On appeal, petitioner argued that the sentence enhancement should be disallowed as unconstitutional, under the reasoning of the Fourth Circuit in *United States*

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[2] Sentencing Guidelines § 3C1.1 provides:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

v. *Dunnigan*, 944 F.2d 178 (1991), cert. granted, 112 S. Ct. 2272 (May 26, 1992) (No. 91-1300), which held that such an increase would act as an unconstitutional penalty for the defendant's exercise of his right to testify. The court of appeals rejected petitioner's argument, reaffirming its settled rule that a district court can enhance a defendant's base offense level for perjury under Sentencing Guidelines § 3C1.1. Pet. App. 21.

ARGUMENT

Petitioner claims that enhancing his sentence under Sentencing Guidelines § 3C1.1 on the ground that he committed perjury while testifying at trial unconstitutionally burdens a defendant's right to testify. He maintains that the decision below conflicts with the Fourth Circuit's decision in *United States* v. *Dunnigan*, *supra*. Pet. 8-14.

We agree with petitioner that a conflict among the circuits exists on this question. The eight other courts of appeals that have addressed this issue disagree with *Dunnigan*. They have held that the Constitution does not prohibit a judge from considering at sentencing the defendant's perjury at trial.[3] Since this question is pending before this Court in *Dunnigan*, we suggest that

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[3] See, *e.g.*, *United States* v. *Batista-Polanco*, 927 F.2d 14, 21-22 (1st Cir. 1991); *United States* v. *Matos*, 907 F.2d 274, 276 (2d Cir. 1990); *United States* v. *Acosta-Cazares*, 878 F.2d 945, 953 (6th Cir.), cert. denied, 493 U.S. 899 (1989); *United States* v. *Contreras*, 937 F.2d 1191, 1194-1196 (7th Cir. 1991); *United States* v. *Wagner*, 884 F.2d 1090, 1097-1099 (8th Cir. 1989), cert. denied, 494 U.S. 1088 (1990); *United States* v. *Barbosa*, 906 F.2d 1366, 1369-1370 (9th Cir.), cert. denied, 111 S. Ct. 394 (1990); *United States* v. *Beaulieu*, 900 F.2d 1537, 1538-1540 (10th Cir.), cert. denied, 497 U.S. 1009 (1990); *United States* v. *Wallace*, 904 F.2d 603, 604-605 (11th Cir. 1990).

the Court should hold the petition in this case pending its decision there.

We disagree, however, with petitioner's contention, Pet. 11-14, that the district court applied Sentencing Guidelines § 3C1.1 in a "wooden or reflexive" manner by enhancing his sentence simply because he testified and was convicted.[4] We agree with petitioner that a testifying defendant who is convicted does not, by that fact alone, "obstruct justice" under Sentencing Guidelines § 3C1.1. But the district court did not simply rely on the jury's guilty verdict as the basis for enhancing petitioner's sentence.

The presentence report recommended in favor of an enhancement for obstruction of justice under Sentencing Guidelines § 3C1.1 on the ground that "[petitioner's] testimony constitute[d] materially false information" as to "the guilt or innocence of the [c]odefendant," Jorge Garcia, petitioner's brother. Presentence Report 6. The district court agreed with the probation officer's recommendation, and the court's finding is supported by the evidence. As the court of appeals noted, Agent Rocha positively identified Jorge Garcia as the person the agent saw walking away from the white truck, and other officers apprehended Jorge Garcia within a few minutes

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[4] Petitioner relies on *United States* v. *Seabolt*, 958 F.2d 231, 233-234 (8th Cir. 1992); *United States* v. *Corn*, 956 F.2d 135, 136 (7th Cir.), cert. denied, 112 S. Ct. 1574 (1992); *United States* v. *Ogbeifun*, 949 F.2d 1013, 1014-1015 (8th Cir. 1991); *United States* v. *Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991), petition for cert. pending, No. 91-6694 (filed Dec. 9, 1991); *United States* v. *Davis*, 938 F.2d 744, 747 (7th Cir. 1991); *United States* v. *Lozoya-Morales*, 931 F.2d 1216, 1218-1220 (7th Cir. 1991); *United States* v. *Husky*, 924 F.2d 223, 224-225 (11th Cir.), cert. denied, 112 S. Ct. 111 (1991); and *United States* v. *Martinez*, 922 F.2d 914 (1st Cir. 1991).

based on Agent Rocha's description of Jorge Garcia and the vehicles that passed by the agent. Petitioner's contradictory story that his brother had been with him the entire morning and that he had not picked up his brother on the road was "materially false information" within the meaning of Sentencing Guidelines § 3C1.1, because it was false and tended to exculpate petitioner's brother. The district court's finding that petitioner obstructed justice by giving material false testimony therefore rests on a finding by the court that petitioner gave false testimony, and not on the fact that the jury convicted petitioner at trial.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Dunnigan*, cert. granted, No. 91-1300, and then should be disposed of as appropriate in light of that decision.

Respectfully submitted.

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